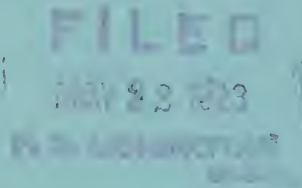


United States
Circuit Court of Appeals
For the Ninth Circuit.

OAKLAND MOTOR CAR COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



United States
Circuit Court of Appeals
For the Ninth Circuit.

OAKLAND MOTOR CAR COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of D. A. Healey and Petition of Oakland Motor Car Company for Return of Automobile	3
Answer to Petition for Return of Personal Property	9
Assignment of Errors	19
Certificate of Clerk U. S. District Court to Transcript of Record	25
Citation on Appeal	26
EXHIBITS:	
Exhibit "A" — Affidavit of J. C. Light-house	11
Names and Addresses of Attorneys of Record.	1
Order Allowing Appeal	21
Order Denying Motion for Return of Automobile	14
Petition for Appeal	18
Petition of Oakland Motor Car Company for Return of Automobile	5
Praeceptum for Transcript of Record	1
Supersedeas Order	22
Undertaking on Appeal	23

Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant, San Francisco, Calif.

UNITED STATES ATTORNEY, Attorney for Appellee, San Francisco, Calif.

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including herein the following documents on file in your office:

1. Affidavit and petition of Oakland Motor Car Company for return of automobile, together with Exhibit "A" attached thereto.
2. The answer of the United States of America to said petition, together with any exhibits which may be thereto attached.

3. The order of Court made and entered April 14th, 1923, denying the application of said Oakland Motor Car Company.

4. The petition for appeal.
5. Specification of errors.
6. Order allowing appeal.
7. Undertaking on appeal.
8. Supersedeas order.
9. Citation on appeal.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed at 10 o'clock and 15 min.
A. M., Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Affidavit of D. A. Healey and Petition of Oakland Motor Car Company (for Return of Automobile).

State of California,

City and County of San Francisco,—ss.

D. A. Healey, being first duly sworn, deposes and says:

That at all of the times herein mentioned Oakland Motor Car Company was and now is engaged in the manufacture of and sale of automobiles in the City and County of San Francisco and at all of said times this affiant was and now is an employee of the said Oakland Motor Car Company and as such employee is fully familiar with the facts below stated and hence makes this affidavit on behalf of said Oakland Motor Car Company.

That on or about the 1st day of May, 1922, Oakland Motor Car Company sold and Daniel Belli purchased from said Oakland Motor Car Company, one Oakland 1921-22 Touring Car 34-D No. 167278, Motor No. H-81435.

That said sale was evidenced by a certain agreement in writing executed on or about the 1st day of May, 1922, and that a true copy of said agreement is annexed to this affidavit and made a part thereof for all purposes.

That the purchase price agreed upon between the buyer and the seller for the said automobile was Nine Hundred Ninety-four and 8/100 (\$994.08) Dollars, to that Three Hundred and [2] 00/100

(\$300.00) Dollars, was paid at the time of delivery of said automobile and subsequently thereto monthly payments, upon the balance due, were made so that at this time there remains due from the said Daniel Belli to Oakland Motor Car Company on account of the said balance of said purchase price the sum of Six Hundred Ninety-four and 8/100 (\$694.08) Dollars.

That under the terms of said contract the legal title to said automobile remains in the Oakland Motor Car Company until the full purchase price of Nine Hundred Ninety-four and 8/100 (\$994.08) Dollars has been paid.

That affiant is informed and believes that the said Daniel Belli, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said automobile to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of September, 1922, in the City and County of San Francisco, State of California, the said defendant, Daniel Belli, was arrested and the said automobile was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said automobile is now in the possession and custody of the

United States Prohibition Enforcement Officer at San Francisco, California, and that said automobile is subjected to the further order of this Court.

Affiant further states that at the time said automobile [3] was entrusted to the care and custody of Daniel Belli, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, and the Oakland Motor Car Company had no knowledge or information nor has it had any notice or information or suspected that said Daniel Belli, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

D. A. HEALEY.

Subscribed and sworn to before me this 2d day of Jany., 1923.

[Seal]

R. P. SHAPRO,

Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires October 7th, 1924.

Petition of Oakland Motor Car Company for Return of Automobile.

Wherefore your petitioner, Oakland Motor Car Company, prays for an order of this Court restoring and surrendering to it the said automobile in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said

contract; or if the said automobile is not so restored and surrendered to your petitioner, but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said automobile at the time of said sale be less than Six Hundred Ninety-four and 8/100 (\$694.08) Dollars, in which event your petitioner prays that the said automobile be returned to your petitioner. [4]

P. R. LUND,
Attorney for Petitioner,
#444 California Street,
San Francisco, California.

Receipt of copy of the within petition admitted this 26th day of February, 1923.

JOHN T. WILLIAMS,
E. L.

U. S. Attorney.

[Endorsed]: Filed Feb. 27, 1923. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [5]

INSTRUCTIONS: 1. Duplicate Original to be sent to General Motors Acceptance Corporation

CONDITIONAL SALE CONTRACT

Before you mail this contract, be sure there is a signature on each red line, and that it is accompanied by letter of transmittal.

(For use in all states except Colo., Ill., La., Mich., Mo., Ohio, Pa.)

San Francisco, Cal., May 1, 1922.
(City) (State) (Month) (Day)

Oakland Motor Car Company, the Seller, hereby sells and

Daniel Belli

the Purchaser, hereby purchases, subject to the terms and conditions hereinafter set forth, the following property, complete with standard attachments and equipment, delivery and acceptance of which is hereby acknowledged by purchaser, viz.:

MAKE	Name	Year Model	Type of Body or Number	Model Letter, Manufacturer's Serial No.	Motor No.	State License No.	New or Used
ONE	Oakland	1921-22	Tour.	34-D	167278	H-81435	NEW

For the total Time Price of \$ 994.08 Nine hundred ninety four & 08/100 ----- Dollars:

Payable as follows: Cash on or before delivery \$ 300.00 Trade in for \$ 694.08 as follows:

\$ <u>57.84</u> One month after date	\$ <u>57.84</u> Five months after date	\$ <u>57.84</u> Nine months after date
\$ <u>57.84</u> Two months after date	\$ <u>57.84</u> Six months after date	\$ <u>57.84</u> Ten months after date
\$ <u>57.84</u> Three months after date	\$ <u>57.84</u> Seven months after date	\$ <u>57.84</u> Eleven months after date
\$ <u>57.84</u> Four months after date	\$ <u>57.84</u> Eight months after date	\$ <u>57.84</u> Twelve months after date

with interest thereon after maturity at the highest lawful rate.

1. In the event purchaser default on any of the above payments, or a proceeding in bankruptcy, receivership, or insolvency be instituted against the purchaser or his property, the full amount then remaining unpaid shall, at the election of the seller, become immediately due and payable.

2. Title to said property shall not pass to the purchaser until the said amount is fully paid in cash. As evidence of such passage of title and upon discharge of all obligations under this contract by the purchaser, the seller will execute and deliver to the purchaser a bill of sale in accordance with Chapter 168, P. L. 1919, New Jersey Statute, provided the purchaser is a resident of New Jersey.

3. Purchaser shall give seller his promissory judgment note of even date herewith as evidence, but not payment, of the amount payable hereunder. This note to contain a confession of judgment, provision for attorney's fees, a waiver of the issue and service of process, all benefits of valuation, appraisalment, and exemption laws, and all rights of appeal and a release of all errors.

4. The negotiation or discounting of said note, or renewals or extensions thereof, the assignment of this contract, or the instituting of suit or procuring of judgment thereon, or the loss, injury or destruction of said property, shall not operate as payment or in any manner release said purchaser from his obligations hereunder, and the holder of said note shall be entitled to all the rights of the seller hereunder.

5. The term "property" whenever used in this agreement shall include any equipment, attachment, accessories and repairs placed on said property by the purchaser. No warranties have been made in reference to said property by the seller to the purchaser unless expressly written hereon at the date of execution of this instrument.

6. Purchaser shall pay and keep said property free and clear of any and all taxes, assessments, liens and encumbrances of any nature whatsoever, shall not use the same improperly or for less without the written consent of the seller, and shall give immediate written notice to seller of any and all loss of, or damage to said property; in default thereof the seller shall have the right to repossess the property and hold the same pending the maturity of the above obligation, all at the expense and risk of the purchaser, which said expense purchaser agrees to pay. The proceeds of any insurance policy on the property shall become subject to the terms hereof, to be applied toward the repair and replacement of the property or payment of the above obligation as the seller may elect.

7. In the event of a default of the purchaser in complying with the terms of payment hereof, the seller may take immediate possession of said property, and for this purpose seller may enter upon the premises where said property may be and remove the same; thereupon all rights of the purchaser hereunder in said property and in the payments theretofore made shall terminate absolutely.

8. Seller may sell said property so retained at public or private sale without demand for performance, in such manner as seller may determine, and to that end may make such repairs as seller deems necessary; and seller shall have the right to bid at any public sale. Seller shall have the right to deduct from the proceeds of any sale all expenses incurred by seller in retaking, repairing and selling said property including a month's attorney's fees, and the balance thereof shall be applied to the amount due holder of said note and any surplus remaining shall be paid over to the purchaser; and in case of a deficiency purchaser covenants to pay the same forthwith with the highest legal rate of interest and the purchaser does hereby confess judgment in the amount of said deficiency.

9. The seller shall have the right to enforce any one or more remedies hereunder either successively or concurrently and such action shall not operate to enjoin or prevent the seller from pursuing any other remedy which he may have hereunder, and any repossession or retaking of the property temporary or otherwise, or sale of the property, pursuant to the terms hereof shall not operate to release the purchaser until full payment has been made in cash.

10. The purchaser shall not transfer any interest in this contract or the property covered thereby without the written consent of the seller.

11. If the seller shall at any time deem said contract, said property, or said debt unsafe or insecure, the whole amount remaining unpaid on said negotiable instrument is by said purchaser admitted to be due and payable and said seller may at said seller's option, repossess said property as herein provided.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this agreement, and to a duplicate and triplicate thereof, one of which was delivered to and retained by the purchaser the day and year first above written.

WITNESSES:

D. A. Healey

(Witness Signature)

H. E. Johnston

(Witness Signature)

Oakland Motor Car Co.

(Seller's Signature)

(L. S.)

By L. S. Shoup, Mgr.

(Official Title)

1246 Van Ness Ave., San Francisco, Cal.

Do not sign here unless you have actually received the property described above, notice by doing so you might place yourself in the position of being a party to a fraud.

Daniel Belli

(Purchaser's Signature)

(L. S.)

By Colma, Cal., Box 84-A

(Official Title)

(Purchaser's Street and Town Address)

GMAC 101

Schedule of Payments

\$ <u>57.84</u> One month after date.
\$ <u>57.84</u> Two months after date.
\$ <u>57.84</u> Three months after date.
\$ <u>57.84</u> Four months after date.
\$ <u>57.84</u> Five months after date.
\$ <u>57.84</u> Six months after date.
\$ <u>57.84</u> Seven months after date.
\$ <u>57.84</u> Eight months after date.
\$ <u>57.84</u> Nine months after date.
\$ <u>57.84</u> Ten months after date.
\$ <u>57.84</u> Eleven months after date.
\$ <u>57.84</u> Twelve months after date.

\$ 694.08 San Francisco, Cal., May 1, 1922.

(City) (State) (Month) (Day)

For Value Received, I (we) promise to pay to the order of _____, 19____

Oakland Motor Car Company

(Seller's Name)

\$ 694.08 Six hundred ninety four & 08/100 ----- DOLLARS

(Total Balance Due)

at the time or times stated in the Schedule of Payments hereon, at the office of General Motors Acceptance Corporation, 311 California Street, San Francisco, Calif., with interest after maturity at the highest lawful rate.

If the purchaser default on any of the above payments, or a proceeding in bankruptcy, receivership or insolvency be instituted against the purchaser or his property, the full amount then remaining unpaid, shall, at the election of the seller, become immediately due and payable.

And I (we) hereby authorize, irrevocably, any attorney-at-law to appear for me (us) in any court of the United States and waive the issue and service of process and confers a judgment against me (us) in favor of the holder hereof, for such amount as may appear to be unpaid hereon, together with costs.

And I (we) agree in the event this note be placed in the hands of an attorney for collection, to pay Any amount due hereon as attorney's fees.

This note covers deferred installments under a conditional sale contract made this day between the payee and maker hereof.

Revenue Stamp—2 cents for each \$100 or fraction of \$100 should be affixed to back hereof.

Daniel Belli

(Purchaser's Signature)

By _____

(Official Title)

Daniel Belli

(Purchaser's Signature)

(Official Title)

(It is imperative that purchaser supply all information requested)
PURCHASER'S STATEMENT

Dated at _____ (City) _____ (State) _____ (Date) _____ 19____
 To _____ (Name of dealer on this line) _____ (State) _____ (City) _____ (Date) _____
 and to General Motors Acceptance Corporation.

In order to secure credit from the above named Dealer and induce the above named Acceptance Corporation to purchase any purchase money obligation which may be executed by me (us) in connection with such credit, I (we) make the following representations:

Full Name _____ Race _____ Age _____

Residence Address or R. D. No. _____ (Street) _____ (City) _____ (State) _____

If not at present address 3 years, give previous address: _____ (Street) _____ (City) _____ (State) _____

Machine will be kept at: Public Garage Private Garage _____ (Street) _____ (City) _____ (State) _____

Purchaser is Single Married Has _____ Dependents Partnership Corporation _____ (Street) _____ (City) _____ (State) _____

Business Position or Profession _____ (Specify what kind)

Employed by _____ How long _____ Monthly Income \$ _____

If in business for yourself, specify what kind _____ How long _____ Monthly Income \$ _____

Business address _____ (Street) _____ (City) _____ (State) _____

Carry Savings Account with _____ (Name Branch) _____ (City) _____ (State) _____ Bank _____ (Street Address) _____

Carry Checking Account with _____ (Name Branch) _____ (City) _____ (State) _____ Bank _____ (Street Address) _____

Ave both Bank Accounts carried in your name? _____ If not, in whose name _____

I (we) own the following property: Location and Description: _____ Cost _____ Present Value _____ Mortgage _____

1 _____ \$ _____ \$ _____ \$ _____

2 _____ \$ _____ \$ _____ \$ _____

References: (Other than Relatives). One must be business house with whom purchaser has had credit dealings.

1 _____ (Name) _____ (Complete Address)

2 _____ (Name) _____ (Complete Address)

I (we) expect to make payments from: Salary Cash in Bank Commissions Professional Fees

Expected Profits of Business ; or from the sale of Oats Corn Barley Wheat Cotton Stock

Or from other sources of income, namely _____ If source checked fails, then what? _____

Have you owned a motor vehicle before? _____ If bought on time, through whom? _____ per month

Motor vehicle will be used _____ % for pleasure, _____ % for business.

If TRUCK Sale, ADDITIONAL INFORMATION Below Is NECESSARY

Assets	Dollars only	Liabilities	Dollars only
Cash on hand and in banks		Accounts payable to N. Banks	
Accounts Receivable		Notes Payable to N. Banks	
Notes Receivable		Others Payable to Merchants (Cost)	
Merchandise (Cost)		Others (When Other Liabilities)	
Real Estate and Buildings		NET WORTH	
Machinery and Fixtures		This figure should equal total	
Other assets (Specify)		TOTAL	
How much insurance are you carrying on merchandise \$ _____		On building, machinery and fixtures, etc. \$ _____	
Net Sales last 12 months \$ _____		Dividends \$ _____	
Net Profits \$ _____		Total Operating Expenses \$ _____	

IF PURCHASER IS FARMER, STOCK RAISER, ETC., INFORMATION BELOW MUST BE GIVEN

I (we) own the following real estate, free and clear of encumbrances except as noted.	Number of Acres	Gash Value Per Acre	Total Gash Value	Owing on Mortgage or Contract	County	State	Held by Deed or Contract	Acres in Crop This Year

There are no mortgages against my (our) this year's crop, except \$ _____ on (what crop) _____ to _____

I (or we) hereby certify that I am (or we are) confident that I (or we) can make the payments on said purchase promptly as they become due.

Signed _____ (Purchaser) _____ (Official Title)

DEALER'S RECOMMENDATION AND ASSIGNMENT

To GENERAL MOTORS ACCEPTANCE CORPORATION:
 For the purpose of inducing you to purchase a note signed by the above-named Purchaser and indorsed by me, the undersigned, the undersigned submits the foregoing statement which the undersigned believes to be substantially true, unless otherwise stated herein, and that the undersigned is not aware from the sale of the within described property to you that, at the time of the transaction of which this is a part, the title to the aforesaid property is not perfect in the undersigned, free and clear of all liens and encumbrances, and that the undersigned has the right to assign such title, right, title and interest in and to the within described property and subdivide said General Motors Acceptance Corporation to do except IN WITNESS WHEREOF, said undersigned has hereunto subscribed his, its or their name this _____ day of _____ 19____

By _____ (Dealer's Signature) _____ (L. S.) _____ (Official Title)

For value received, we and each of all of the indorsers hereon jointly and severally guarantee payment of the within obligation, as and when the same shall become due, and of any interest thereon in whole or in part, accepting all its provisions, and obligating the maker, without notice to us or either of us, to obtain an extension or extension in whole or in part, and waiving presentment for payment, demand, protest and notice of protest and non-payment, also agreeing that in case of non-payment of the within obligation when due suit may be brought by the holder of said obligation, whether such suit be at the option of said holder, or not and that in case of such suit, the maker may be joined with one or more of all of us, at the option of the holder.

Place all revenue stamps below this line

By _____ (Additional Indorsers) _____ (Official Title) _____ (Seller's Signature)

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Answer to Petition for Return of Personal Property.

Comes now the above-named plaintiff, by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of petitioner herein, denies and alleges as follows:

That plaintiff and respondent have no information or belief respecting the allegations in petitioner's petition herein, to wit: "That at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, and the Oakland Motor Car Company had no knowledge or information nor has it had any notice or infor-

mation or suspected that said Daniel Belli, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquors," sufficient to enable plaintiff or respondent to answer the same, and basing his answer upon that ground denies that when said car was entrusted to the care or custody of Daniel Belli the said affiant D. A. Healey had no knowledge, notice, information or suspected that said Daniel Belli intended to use [8] or was using said automobile in unlawfully transporting intoxicating liquor, and upon the same ground denies that the said Oakland Motor Car Company had no knowledge, information, notice or suspected that the said Daniel Belli intended to use or was using said automobile in said unlawful transportation of intoxicating liquor.

That the facts and circumstances connected with the seizure of said automobile are fully set out in the affidavit of one J. C. Lighthouse, which said affidavit is hereto attached, made part hereof, and marked Exhibit "A," to the same effect as if again set out herein in full.

WHEREFORE plaintiff and respondent prays that said petition be denied.

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Atty.,
Attorneys for Plaintiff. [9]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Affidavit of J. C. Lighthouse.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

J. C. Lighthouse, being first duly sworn, deposes and says: That he is and at all of the times herein mentioned was a Deputy Collector of the Internal Revenue for the First Internal Revenue Collection District of the State of California.

That on the 26th day of September, 1922, affiant as such Deputy Collector of Internal Revenue, and acting as such, was at 378 Broadway Street, City and County of San Francisco, State of California, and while there present the defendant Daniel Belli drove up to said place in an Oakland 1921-22 touring car, being the car mentioned, described and referred to in petitioner's petition herein; that at the time the said defendant drove up to said place he had in the said touring car two five-gallon kegs of

intoxicating liquor, to wit, brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, and had transported the same from some place unknown to affiant to said No. 378 Broadway Street in said City and county; that the said defendant at the time of the said transportation had no permit to transport or have in his possession said or any intoxicating liquor; that affiant then and there seized the said liquor and said automobile and immediately thereafter, to wit, the last-mentioned date, made an affidavit and caused an information to be filed [10] charging the said defendant with possessing and transporting the said intoxicating liquor.

That thereafter and heretofore, affiant as such Deputy Collector of Internal Revenue, delivered the said car and said property to Samuel F. Rutter as Prohibition Director in and for the State of California, and the same is now in his possession.

J. C. LIGHTHOUSE.

Subscribed and sworn to before me this 9th day of March, A. D. 1923.

[Seal]

C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 10, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL et al.,

Defendant.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

Order Denying Motion (for Return of Automobile).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public

auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor." [13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253 allowed a lien for the amount of the unpaid purchase price under what the opinion calls "a conditional bill of sale," although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit "a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law."

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: "It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this state that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Parke & Lacey Company vs. White River Lumber Company*, 101 Cal. 37, *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony* 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States*, No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an at-

tempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[16]

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The Oakland Motor Car Company, petitioner herein, feeling aggrieved by the decree and order rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said decree and order to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree and order was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

Assignment of Errors.

Now comes the Oakland Motor Car Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing to render an order and decree pursuant to the petition of the Oakland Motor Car Company, filed in

the above cause, applying for the return to it, the said Oakland Motor Car Company, of a certain touring car in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the Oakland Motor Car Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain touring car, described in the petition of the said Oakland Motor Car Company filed herein, to the extent of Six Hundred Ninety-four [18] and 8/100 (\$694.-08.) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the Oakland Motor Car Company have a lien upon the proceeds of sale of the certain touring car described in the petition of the said Oakland Motor Car Company, filed herein.

P. R. LUND,

Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

In the United States District Court for the Northern District of California.

No. 12871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the Oakland Motor Car Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court for the Northern District of California.

No. 12871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

Supersedeas Order.

This cause coming on to be heard this — day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Galbreath, Deputy Clerk.
[21]

In the United States District Court for the Northern District of California.

No. 12871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00, to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney in fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause pending in said Court, an order and decree was rendered against the Oakland

Motor Car Company, petitioner, in intervention in said action, and the said Oakland Motor Car Company having obtained from said Court, an appeal to reverse the order and decree [22] in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Oakland Motor Car Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY,
(Signed) By J. S. ELLIOTT, (Seal)
Attorney in Fact.
J. S. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America vs. Daniel Belli (Oakland Motor Car Co. Claimant of Automobile), No. 12871, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five Cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and Daniel Belli is defendant and petitioner in intervention, Oakland Motor Car Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,871. United States District Court for the Northern District of California.

Oakland Motor Car Company, (a Corporation),
Appellant, vs. United States of America. Cita-
tion on Appeal. Filed Apr. 26, 1923. Walter B.
Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

[Endorsed]: No. 4025. United States Circuit
Court of Appeals for the Ninth Circuit. Oakland
Motor Car Company, Appellant, vs. United
States of America, Appellee. Transcript of Rec-
ord. Upon Appeal from the Southern Division of
the United States District Court for the Northern
District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

